Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. ....

76-946

ROBERT O. WALTON,

Petitioner,

VS.

STEVEN FRANCIS WALTON, by and through his next friend, VELMA L. BAKER,

Respondent.

Petition for Writ of Certiorari to The District Court in and for the County of Jefferson, State of Colorado

PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari to The District Court in and for the County of Jefferson, State of Colorado

PETITION FOR WRIT OF CERTIORARI

OFFICIAL AND UNOFFICIAL REPORTS

The judgment on Appeal of the District Court of Jefferson County, Colorado has not been reported. A copy of said judgment is appended (see Appendix A).

The opinion of the Supreme Court of Colorado, denying a Petition for Writ of Certiorari to the District Court of Jefferson County, has not been officially reported. However, see *Walton* v. *Walton*, 5 Colorado Lawyer 1897 (Dec. 1976) indicating that on October 18, 1976, the Colorado Supreme Court denied the Petition. A copy of the Order is appended (See Appendix B).

JURISDICTION

Petitioner, Robert O. Walton, is appealing the Judgment on Appeal of the District Court of Jefferson County pur-

suant to Section 1257 (3) of Title 28 of the United States Code:

> "Final Judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari, . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . ."

The Judgment on Appeal of the District Court of Jefferson County was entered on August 20, 1976.

Petitioner subsequently filed in the Colorado Supreme Court a Petition for Writ of Certiorari to the District Court of Jefferson County. An Order denying the Petition was entered on October 18, 1976.

Petitioner argues that the Judgment on Appeal of the District Court of Jefferson County is a final judgment rendered by the highest Court of the State of Colorado in which a decision could be had. See *Chicago & E.I.R. Co.* v *Industrial Commission of Illinois, et al.*, 52 S.Ct. 151, 285 U.S. 296, 76 L.Ed. 304 (Ill. 1932); *American Railway Express Co.* v. *Levee,* 44 S.Ct. 11, 263 U.S. 19 (La. 1923).

QUESTIONS PRESENTED FOR REVIEW

Petitioner is challenging the constitutionality of C.R.S. 1973, 13-15-101, *Change of Name* and 13-15-102, *Publication of Change* on the grounds these statutes do not provide for notice to a divorced non-custodial parent of the filing of a Petition for a Change of Name of his or her natural minor child by the custodial parent, in violation of the Due Process clause of the United States Constitution.

Petitioner specifically challenges the statutory proceedings wherein Respondent, Velma L. Baker, filed a Petition on March 25, 1974, on behalf of her son, Steven Francis Walton, a minor, requesting the Court to change Steven's name to Steven Howard Baker, without having to notify Petitioner of her Petition.

Petitioner further challenges the issuance of an Order on March 12, 1976, by the County Court of Jefferson County, State of Colorado, granting Respondent's Petition for a Change of Name without providing or requiring personal notice to Petitioner of such a Petition, even though Respondent had actual knowledge of the whereabouts of Petitioner.

Petitioner further petitions this Court to set aside the County Court's order of March 25, 1974, changing his natural son's name.

Petitioner further petitions this Court to reverse the County Court's order of March 12, 1976, and the District Court's order of August 20, 1976, denying his Petition to set aside the change of name.

Petitioner further petitions this Court to find, in the alternative, that if the statutes referred to above are not unconstitutional, they should be construed to require notice to the father before any Court grants the custodial mother's Petition to change the name of their minor child.

STATUTES

CHANGE OF NAME

13-15-101. Petition—proceedings. Every person desiring to change his name may present a petition to that effect, verified by affidavit, to the district, superior, or county court in the county of the petitioner's residence. The petition shall set forth the petitioner's full name, the new name desired, and a concise statement of the reason for such desired change.

The court shall order such change to be made, and spread upon the records of the court in proper form, if the court is satisfied that the desired change would be proper, and not detrimental to the interests of any other person.

Colorado Revised Statutes (1973)

Volume 6, Page 90

13-15-102. Publication of change. Public notice of such change of name shall be given at least three times in a newspaper published in the county where such person is residing within twenty days after the order of the court is made, and if no newspaper is published in that county, such notice shall be published in a newspaper in such county as the court directs.

Colorado Revised Statutes (1973)

Volume 6, Page 90

STATEMENT OF THE CASE

Robert O. Walton and Velma L. Walton were divorced on June 6, 1963, and custody of the minor child Steven Francis Walton was awarded to Velma L. Walton. Robert O. Walton was ordered to pay child support and awarded visitation rights. During the period 1963 through 1974, Velma L. Walton knew the whereabouts of her former husband. Robert O. Walton, prior to the filing of the Petition for Change of Name, was paying child support and willing to exercise his right to visit the child.

At no time did Mrs. Walton (now Baker through remarriage) or her counsel advise Mr. Walton or his counsel of the Change of Name Petition which was filed on March 25, 1974, by Mrs. Baker on behalf of her son, Steven Francis Walton, in the Jefferson County Court (Civil Action 74C-10980), nor of the Decree effective March 25, 1974, changing Mr. Walton's natural son's name from Steven Francis Walton to Steven Howard Baker.

Mr. Walton first became aware of the Decree on February 17, 1976, at a hearing in the Court having jurisdiction over the divorce (Division 5 of the Jefferson County District Court, Civil Action No. 18635) on Robert O. Walton's Motion to Compel the Use of his Child's Proper Name. That Court in its Order of February 17, 1976, on page 2, paragraph 2 stated:

> "The Court specifically finds it does not have jurisdiction to set aside the change of name to Steven Howard Baker, which was ordered in Jefferson County Court in Civil Action No. 74C-10980."

Mr. Walton, on February 25, 1976, filed in the County Court his Petition to Set Aside the Change of Name. Mr. Walton alleged in paragraph 13 that he was denied his fundamental and constitutional right to due process. A hearing was held on March 12, 1976, at which time Mr. Walton's Petition was denied by the Honorable Kim H. Goldberger, Judge, on the grounds that: (1) Mr. Walton lacked standing to appear or object to Mrs. Baker's Petition; (2) Steven had the right at common law to change his name; (3) Mr. Walton was not entitled to notice of the filing of the Petition for Change of Name; and (4) the Colorado statutes on the Change of Name are not unconstitutional.

Mr. Walton subsequently filed his Appeal in the District of Jefferson County alleging, among other grounds, that the Colorado change of name statutes are unconstitutional as they violate the due process clause of Article XIV, Section I of the United States Constitution. On August 20, 1976, the Honorable Ronald J. Hardesty, Judge, rendered his Judgment on Appeal affirming the County Court. (See Appendix A).

Mr. Walton filed a Petition for Writ of Certiorari in the Colorado Supreme Court on September 13, 1976, further

alleging, among other grounds, that the Colorado Change of Name statutes violated the due process clause of the United States Constitution.

On October 18, 1976, the Colorado Supreme Court denied Mr. Walton's Petition for Writ of Certiorari. (See Appendix B). The Court did not issue any opinion stating the grounds for the denial.

ARGUMENT

I

WAS MR. WALTON ENTITLED TO ACTUAL AND PERSONAL NOTICE OF THE FILING OF THE PETITION TO CHANGE HIS NATURAL CHILD'S NAME?

Petitioner, Mr. Walton, argues that he was.

Petitioner directs the Court's attention to *Armstrong* v. *Manzo*, 85 S.Ct. 1187, 380 U.S. 545 (1965), where this Court enunciated the requirement that notice be given to one parent by another regarding litigation involving their child. At p. 550, the Court, quoting from a number of memorable prior decisions, said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections."

In this instance, Mr. Walton was not afforded that most elementary and fundamental requirement of due process. Rather, Mrs. Baker, being fully aware that Mr. Walton would object to her Petition, purposefully avoided notifying him personally.

The Court in *Armstrong* further went on to say:

> "Questions frequently arise as to the adequacy of a particular form of notice in a particular case . . . But as to the basic requirement of notice itself there can be doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies."

There is no question that the language of *Armstrong* is directed to the kind of situation involved in this case.

The Colorado Supreme Court in *In Re Petition of T.C.H.* v. *J.M.S.*, 545 P.2d 1357 (Colo. 1976), acknowledged that a father has an interest in seeing that his child bear his name. Yet Mr. Walton's interest was denied protection by the acts of Mrs. Baker in failing to give him notice of her Petition.

In *Eschrich* v. *Williamson*, 475 S.W. 2d 380 (Tex. Civ. App. 1972) the child's mother's successful petition to change the name of her minor child was overturned because of the lack of notice to her natural father. The Court indicated such notice is guaranteed by the 14th Amendment to the U.S. Constitution.

As in CRS 1973, Sections 13-15-101 and 13-15-102, the Texas statute did not provide for notice to the noncustodial parent.

Yet the Texas Court construed its statute to conform with the requirements of both the state and federal constitutions.

It should be pointed out that the Texas legislature in 1973, repealed Article 5929, and pursuant to the Texas Court's opinion in *Eschrich* adopted Title 2 of the Texas Family Code which at Section 32.03 provides that in a change of name action:

> "The following persons are entitled to citation in a suit under this subchapter: (1) each parent whose parental rights have not been terminated."

Petitioner argues that this Court has the same duty as the Texas Court: To construe Sections 13-15-101 and 13-15-102 to provide notice to a father, specifically Mr. Walton in the instant case.

II

WAS THE DECREE OF MARCH 25, 1974, CHANGING MR. WALTON'S NATURAL CHILD'S NAME OBTAINED IN VIOLATION OF MR. WALTON'S RIGHT TO DUE PROCESS?

The Colorado State Constitution and the United States Constitution provide that no person shall be deprived of life, liberty or property, without due process of law.

The U. S. Supreme Court in *Armstrong, supra,* disposed of the issue of whether or not parental rights are included within the confines of the due process clause:

> "It is clear that failure to give Petitioner notice of the pending adoption proceedings violated the most rudimentary demands of the due process of law." 380 U.S. at p. 550.

Even though the particular issue in this case has not been decided in Colorado, the Colorado Supreme Court did address itself to the rights of a father in *T.C.H.* v. *J.M.S., supra,* in acknowledging that a father may hope his son will bear his name. In dicta the Colorado Supreme Court was putting on notice custodial parents that they had a duty to give notice to noncustodial parents regarding litigation involving their child.

The Texas Court of Civil Appeals in *Scucchi* v. *Woodruff,* 503 S.W.2d 356 (Tex. Civ. App. 1973), went one step further in its notice requirement to the noncustodial parent in a name change case. In *Scucchi,* the judgment changing the last names of two minor children was reversed when notice that was given the father was insufficient to put the

father in Court, even though the father had actual notice of pending suit.

Petitioner in this case argues that the rudimentary requirements of actual notice which existed in *Scucchi* were not even present under the facts here.

As Mr. Justice Harlan indicated in his dissent in *In Re Gault,* 387 U.S. 1, 81, 87 S.Ct. 1428, 1471, 18 L.Ed. 2d 527, 576 (1967):

> "Similarly, due process clearly requires timely notice of the purpose and scope of *any* proceeding affecting the relationship of parent and child." (Emphasis added)

Mr. Justice Harlan approvingly cited *Armstrong* v. *Manzo, supra,* in *Gault.*

Petitioner urges this Court to adopt the California view outlined in *Application of Malloy,* 8 Cal. Rptr. 143, 185 Cal. App. 2d 135 (1960). In *Malloy* the mother filed a petition for change of her children's names. The petition stated the father was living in Los Angeles. There was notice by publication under a statute similar to CRS 1973, Section 13-15-102, except that publication had to be printed prior to hearing on petition. The father did not attend and the Petition was granted. The father subsequently filed a petition to set aside the decree.

The issue to be determined was: Could the Court grant relief from the change of name decree when the statute requiring only publication was complied with? The Court stated:

> "We are convinced that the trial court was authorized to set aside the decree . . ."

Petitioner argues that the instant case is quite similar in its facts to *Malloy* and that this Court under the same factual and legal circumstances has the duty to set aside the decree.

III

ARE CRS 1973, SECTION 13-15-101, *CHANGE OF NAME,* AND SECTION 13-15-102, *PUBLICATION OF CHANGE,* UNCONSTITUTIONAL?

Mr. Walton argues that these statutes are unconstitional per se and as applied.

As this Court indicated in *Armstrong, supra,* at a minimum, due process requires that deprivation of life, liberty or property by adjucation be *preceded* (emphasis added) by notice.

Section 13-15-102 does not meet that most rudimentary demand of due process. It provides for notice by publication after the decree has been granted. *Armstrong* and its predecessors require notice apprising an interested party of the pendency of the action and affording him an opportunity to object. The statute at issue forecloses any opportunity to file one's objection.

The Colorado statute has not been challenged in the Courts; however, similar statutes in other jurisdictions have been and suffered the same fate: The Courts have found them to be lacking in their notice requirements.

In 1960, in the *Application of Malloy,* 8 Cal. Rptr. 143, 185 Cal. App. 2d 135 (1960), the wife gave notice by publication *prior* to the hearing. The Court overturned the change of name. In 1961, the California legislature added a third paragraph to its change of name statute:

> "If such person is under 18 years of age, and the petition is signed by only one parent, the petition must specify the address, if known, of the other parent if living." West Ann. Code of Civ. Proc.
>
> —Change of Names, Section 1976."

Further, Section 1277, also added in 1961, provides that the Clerk of the Court shall notify the other parent of the filing of the petition and of the hearing at least ten days prior to said hearing.

In Texas the issue was raised in 1972, in *Eschrich* v. *Williamson, supra.* No notice requirement in the change of name statute to the noncustodial parent. The father argued denial of due process in violation of U.S. and Texas constitutions. Again, change of name overturned.

In 1973, the Texas legislature adopted a new statute providing that notice must be given, in a change of name proceeding, to each parent whose parental rights have not been terminated.

In other jurisdictions changes in the statutes may not have been prompted by case law, nevertheless the legislatures accepted the notion that fair notice requirement to noncustodial parents were proper. New York in 1953, revised its change of name statute to include notice of any petition to the other parent when the petition is filed by the custodial parent. Ohio did likewise in 1963. Numerous other states have similar clauses in their change of name statutes: Minnesota, New Jersey, Maryland, Florida, Wisconsin, Michigan, Maine, etc.

IV

WOULD MR. WALTON HAVE HAD STANDING TO APPEAR IN A PETITION FILED BY HIS NATURAL CHILD'S MOTHER FOR A CHANGE OF NAME OF THAT CHILD?

A. Petitioner, Mr. Walton, argues that he had standing to intervene in a Petition, filed by his natural child's mother to change the child's legal name and that this right was denied him by the child's mother, Velma Walton (now Baker).

Rule 24 of the Colorado Rules of Civil Procedure provides that:

> "One *shall* be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The case law holds that an intervenor must show an interest in the subject matter of the litigation, *Hulst* v. *Dower*, 121 Colo. 150, 213 P.2d 834 (1949).

Mr. Walton, had he been aware of the petition, would have claimed an interest in the action: He would have objected to the petition's request to have his surname removed from his child's legal name.

Further, the legal concept of intervention is based upon the natural right of the litigant to protect himself from the consequences of an action by the result of which he may be bound, *Grijalva* v. *Elkins*, 132 Colo. 315, 287 P.2d 970 (1955).

Mr. Walton's natural right as a father was subject to irreparable harm by the mere filing of a petition attempting to strip his child of his parental surname. See *Application of Yessner*, 304 N.Y.S. 2d 901 (1969) where the Court said that to deprive a son of his father's surname is a serious and far reaching action. A father has a natural right to have his son bear his name and courts should not endeavor to interfere with the usual custom of succession of parental surname or foster any unnatural barrier between father and son.

Further, in *Solomon* v. *Solomon*, 5 Ill. App. 2d 297, 125 N.E. 2d 675 (1955), the Court in that case enunciated the

rule which Mr. Walton urges this Court to adopt in Colorado. If a father has shown an interest in his child by paying support, visiting or attempted to visit, he has standing to object to the change of name.

The Colorado Supreme Court, in *In Re Petition of T.C.H.* v. *J.M.S., supra,* an adoption case, stated at p. 1360: "A father may hope his son will bear his name." That Court, as recently as February 23, 1976, was reaffirming its long held position that the ties which exist between a child and his parent may not be arbitrarily severed by the other parent.

Mr. Walton also contends that his interests were not adequately represented by existing parties in the Petition.

B. Mr. Walton further contends that as the father in a Petition by his ex-wife to have his child's surname changed, he was in fact a party defendant and therefore entitled to notice.

The case of *In Re Larson*, 81 Cal. App.2d 258, 183 P.2d 688 (1947) stands for the proposition that a father has a protectible interest in having the child bear the paternal surname. It refers to that interest as a "primary right."

In that case, a mother changed the name of the child without notice to the father, a prisoner of war in Germany. The Court found that by liberally construing the Soldiers' and Sailors' Act, the father was a defendant and as such was an interested party entitled to notice.

That case was followed by two decisions, without Soldiers' and Sailors' Act fact situations; however, in each instance the Court quoted *Larson* as being the proper state of the law and supporting Petitioner's contention that the father in a change of name action holds the status of a defendant. See *Application of Malloy, supra,* and *Application of Trower*, 66 Cal. Rptr. 873 (1968). See also *Solomon* v. *Solomon, supra,* and *Robinson* v. *Hansel*, 223 N.W.2d 138 (Minn.

1974) where the Courts said that a father has standing to appear and object.

C. Petitioner, Mr. Walton, further argues that the lack of notice of the filing of the Petition adversely affected his opportunity to appear and present his case at the hearing on the change of name in that today his burden of proof has been materially altered by the granting of the Decree of Change of Name.

In *Armstrong* v. *Manzo, supra,* this Court, faced with a case where the divorced mother obtained an adoption decree without notice to the natural father, indicated that the granting of a hearing to the father subsequent to the granting of the Decree to the mother was insufficient to clear the constitutional infirmity which resulted from the failure to give the father notice.

The Court stated that had the father received "the timely notice which the Constitution requires . . . the moving parties would have had the burden of proving their case as against whatever defenses the petitioner might have interposed . . . instead the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree . . . for 'it is plain that where the burden of proof lies may be decisive of the outcome' " at p. 551.

Similarly, in this action Petitioner, Mr. Walton, was faced with a Decree approximately two years old based on a petition which stated in part that "the name change will not be detrimental to the interests of any other person."

Mr. Walton, had he been given an opportunity, as required by the Constitution, to intervene would not have been faced as he was on March 12, 1976, with the burden of showing that the name change was in fact detrimental to him. The burden would have been on Mrs. Baker and Steven Walton to show that the change of name was not detrimental to Mr. Walton's interest.

D. Petitioner, Mr. Walton, further argues that under Rule 19 of the Colorado Rules of Civil Procedure—*Joinder of Parties Needed for Just Adjudication*—he was denied by the Court and the Petitioners, Mrs. Baker and Steven Walton, the right to present his case.

Mr. Walton, as previously discussed, was an interested party in any action involving his child changing his name, yet neither Court under the Rule nor the Petitioners included Mr. Walton as a necessary party.

V

DID STEVEN FRANCIS WALTON, A MINOR, HAVE THE RIGHT AT COMMON LAW TO CHANGE HIS NAME?

Petitioner argues that the case law on that issue, through minimal, is clearly against that proposition.

In *Application of Trower,* 66 Cal. Rptr. 873 (1968), the mother attempted to have the child's name changed by adding her second husband's name. The Court denied the Petition, as the natural father, who objected, was paying support and showing an interest in the child. The Court said: "At common law, a minor did not have the right to change his name." See also, *Mark* v. *Kahn,* 131 N.E.2d 758, 53 A.L.R. 2908 (Mass. 1956) where the Court indicated that the common law rule that persons could change names at will did not justify a divorced wife in selecting for her children a name different from that of their natural father.

In *Kay* v. *Beel,* 95 Ohio App. 520, 121 N.E.2d 206 (1953), a case where the father sued the school board to enjoin them from continuing to list his child under the last name of his ex-wife's new husband, the Court ruled that the mother could not unilaterally change the name of a minor child and ordered the school administration to enroll the child under the father's name.

CONCLUSION

Petitioner therefore urges this Court to declare that in 1976, statutes such as C.R.S. 1973, § 13-15-101 and 13-15-102 are antiquated and in violation, both per se and as applied, of the most fundamental of rights—the Due Process clause of the United States Constitution.

Respectfully submitted,
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CERTIFICATE OF MAILING

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed this ...6... day of .... January..., 1977., by depositing same, with first class postage prepaid, in the united States mail addresses to:

CONRAD E. GARDNER, ESQ.
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APPENDIX A

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
AND STATE OF COLORADO

Civil Action No. 49621

ROBERT O. WALTON,
Defendant-Appellant

v.

STEVEN FRANCIS WALTON, by and through his next friend,
VELMA L. BAKER,
Petitioner-Appellee

Judgment On Appeal

This is an appeal of the Honorable Kim H. Goldberger, County Judge; and the Court now, having considered the record and the briefs, finds that the decision of Judge Goldberger was well reasoned and is amply supported by the evidence and the law.

THEREFORE, the judgment of the County Court is hereby affirmed without further opinion. The Clerk of the Court is ordered to remand this matter back to the County Court.

DONE IN CHAMBERS this 20th day of August 1976, at Golden, Colorado.

By the Court:

RONALD J. HARDESTY,
District Judge

cc: Mr. Conrad E. Gardner
Mr. J. Michel Cayatte

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

ROBERT O. WALTON,
Petitioner,

C-1056 vs.

STEVEN FRANCIS WALTON, by and through his next friend, VELMA L. BAKER,
Respondent.

AMENDED
Order Denying Petition for Writ of Certiorari

ON PETITION FOR WRIT OF CERTIORARI to the District Court of Jefferson County.

After review of the record, the briefs and the opinion of the District Court of Jefferson County,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

BY THE COURT, EN BANC, OCTOBER 18, 1976.